IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Misc. No. 76-445

RAYMOND K. PROCUNIER, et. al., Petitioners,

v.

APOLINAR NAVARETTE, JR., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 536 F.2d 227.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the following actions, done in negligent disregard of a prisoner's substantive constitutional rights which were in fact curtailed by such actions, give rise to causes of action under Section 1983:

(a) Deliberate refusal to mail certain of a prisoner's

outgoing letters;

(b) Termination of a law student visitation program from which a prisoner obtains assistance in preparing legal actions;

(c) Removal of a prisoner as prison law librarian?

2. Whether removal of a prisoner as a prison law librarian and termination of a law student-inmate visitation from which he obtains assistance in preparing legal actions, done in knowing interference with his right of access to the courts, give rise to a cause of action under Section 1983?

3. Whether deliberate refusal to mail certain of a prisoner's outgoing letters in 1971-72 done in either knowing violation or negligent disregard of applicable court decisions but before Martinez v. Procunier, 354 F.Supp. 1092 (N.D. Cal. 1973) was decided, gives rise to a cause of action under Section 1983?

4. Whether deliberate refusal to send certain of a prisoner's outgoing letters by registered mail can give rise to a cause of action under Section 1983?

STATEMENT OF THE CASE

The court below ruled on a complaint by Navarette setting forth nine causes of action under Sections 1983 and 1985, and seeking relief in damages. This complaint had been several times amended, in that it was initially filed pro se by Navarette while a state prisoner and subsequently revised twice by within counsel after being retained by Navarette.

The complaint alleges three sets of facts from which relief is sought: deliberate interference with Navarette's outgoing mail; termination of Navarette's position as law librarian; and termination of a law student visitation program from which Navarette obtained legal assistance. The first through the sixth causes of action, upheld by the court below as to Section 1983, allege alternately with respect to these same sets of facts as to petitioners' actions that said actions were done either in knowing violation or in negligent disregard of Navarette's substantive constitutional rights as guaranteed by the First and Sixth Amendments.

ARGUMENT

I. THE DECISION BELOW DOES NOT ESTABLISH A NEWLY BROAD BASIS FOR RELIEF IN NEGLIGENCE

The court below upheld those of Navarette's causes of action which sound in negligence with this appropriately narrow language:

> "Of course we do not imply that all tortious conduct engaged in by a public official acting under color of state law is subject to redress under Section 1983. A Section 1983 plaintiff must show that he has been deprived of a federally protected right by reason of that conduct....here the prisoner's rights which Navarette alleges to have been violated are fundamental and reasonably well-defined..." (Petitioners' Appendix, p. viii)

The foregoing decision is thus squarely in accord with Paul v. Davis, ___U.S.___, 47 L.Ed.2d 405, 96 S.Ct.____, where this Court, in holding an interest in reputation to be insufficient for purposes of triggering Section 1983, noted: "Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded," 47 L.Ed.2d at 413. Herein the specific guarantees of the First and Sixth Amendments protect the activities by Navarette which Petitioners thwarted through their actions which were intentionally directed at his protected activities.

The court below is likewise in no conflict with other decisions cited by Petitioners. Jenkins v. Meyers, 338 F.Supp. 383, for example, struck down a Section 1983 claim because it involved merely the inadvertant mailing by prison officials of a prisoner's transcript to the wrong addressee instead of to the prisoner's attorney. The court therein urged that the state official should have intended the factual result of his actions before negligence be allowed as a basis for relief:

> " (Section 1983) is meant to apply only to conscious intended acts even under circumstances where there is a total innocence as to the constitutionally violative nature of the act and result (except where that innocence would be a common law tort defense such as good faith in false arrest cases)....The very language of Monroe v. Pape as to the responsibility of a man for the natural consequences of his actions implies some minimum degree of knowledge that the action is taking place." 338 F.Supp. at 390.

Since Petitioners herein concede that they deliberately intended the factual results of each of the actions from which Navarette seeks relief, the foregoing language is squarely in accord with the decision below. The same can be said for other decisions cited by Petitioners: Section 1983 claims sounding in negligence have generally been denied where the factual results were not

intended or strongly foreseeable, or where the injured interests could not be subsumed under substantive constitutional protections. Thus, in Beishir v. Schanzmeyer, 315 F. Supp. 519 (W.D.Mo. 1969), where no claim was deemed stated for the negligent failure by prison guards to make a list of the prisoner's confiscated property, his ensuing loss was not strongly foreseeable, and, in any case, involved merely a property interest. Likewise in Bonner v. Coughlin, No. 74-1422 (7 Cir. 10/76), cited by Petitioners in their supplemental letter to this Court dated 12/7/76, where no claim was deemed stated for the negligent failure by prison guards to secure a prisoner's cell door, thereby permitting theft of his court transcript, the identical analysis applies as in Beishir, supra.* Similarly in Kent v. Prasse, 385 F.2d 406 (3 Cir. 1967), where no claim was deemed stated by a prisoner injured because required by prison officials to work on a press known to be dangerous the tortious conduct lacked any aggravating factor, and the prisoner possessed only a property interest in his physical health.

Each of the foregoing decisions holding no claims to have been stated can thus be reconciled by the above criteria with the decision below. On the other hand, McCray v. State of Maryland, 456 F.2d 1 (4 Cir. 1972) does appear, as Petitioners assert, to conflict with the above criteria in holding a claim to be stated against a court clerk merely for negligence of the inadvertant character involved in Jenkins v. Meyers, supra. However, this apparent conflict does not involve the holding below, and hence is unpersuasive as a reason for granting certiorari herein.

Likewise unpersuasive as a reason for granting certiorari herein is the fact that certiorari has already been granted in Estelle v. Gamble, No. 75-929 (516 F.2d 937 (5 Cir. 1975)), wherein issues are raised about allegedly negligent medical treatment and unfounded solitary confinement. These Eighth Amendment-related issues pose difficulties in drawing a viable perimeter around actionable infringements of prisoner interests without importing the entire body of related tort claims. Standards for accomplishing this have been varied and loosely worded. Cf. Church v. Hegstrom, 416 F.2d 449 (2 Cir. 1969)(actionable failure to provide medical care must amount to "conduct that shocks the conscience" or a "barberous act"). Intervention by this Court to formulate a viable

*Consistently with the above criteria, Bonner/the "'fundamental and reasonably well-defined' constitutional rights" involved herein contrasted with the merely "generalized due process right" asserted therein (p. 8 of opinion supplied by Petitioners)

perimeter to Section 1983 claims in the Eighth Amendment area is thus much needed. In contrast, the First and Sixth Amendment areas involved herein protect conduct that does not interfere so broadly with multitudinous ordinary tort claims, and in any case have posed no untoward difficulties to the lower federal courts in setting perimeters to Section 1983 claims of infringement upon such expressly protected conduct.

II. THE RETALIATORY DENIAL OF A PRISONER'S PRIVILEGES GIVES RISE TO A CLAIM UNDER SECTION 1983

Petitioners claim that Montayne v. Haymes, ___U.S.___, 49 L.Ed 2d 466, 96 S.Ct.___, establishes that Navarette failed to state a federal claim for interference with his right of access to the courts through his removal as prison law librarian and the termination of the law student visitation program. However, in Montayne, supra, the removal of plaintiff therein as law librarian simply triggered a chain of events which culminated in transfer of that plaintiff to another prison, said transfer being the sole link to this chain which this Court found necessary to rule upon. That ruling, which concluded that procedural due process is not necessarily triggered by a nonpunitive transfer between prisons, did not reach the latent issue as to the reasons for removal of the plaintiff therein as librarian.

Herein, in contrast, the sole issue posed in this connection is whether a Section 1983 claim is raised by the deliberate withdrawal of Sixth Amendment-related privileges (both the librarianship and the student visitation) where the purpose, or at least the strongly foreseeable result, is a substantial curtailment of Navarette's pursuit of various legal actions. Such withdrawal of privileges need not, as Petitioners argue, be discriminatory to be actionable. Rather, the sine qua non is whether the withdrawal of such privileges is in reprisal for Navarette's persistent resort to the courts, or, put differently, done with an aim or expectation of curbing or hampering such legal actions. Cf. In re Harrell, 2 Cal.3d 675, 695 (1970); Hatfield v. Halleaux, 290 F.2d 632, 638 (9 Cir. 1961). This issue simply applies the broader precept that denial of "...a benefit to a person on a basis that infringes his Constitutionally protected interests" is subject to constitutional scrutiny lest "...his exercise of these freedoms would in effect be penalized and inhibited (citations)," Perry v. Sinderman, 408 U.S. 593, 597 (1972).

These Sixth Amendment-related claims by Navarette thus are clearly cognizable, and raise no problem calling for intervention

by this Court.

III. THE DECISION BELOW IS NOT UNFOUNDED BECAUSE THE ALLEGED MAIL INTERFERENCE ANTEDATED MARTINEZ V. PROCUNIER OR INCLUDED THE REFUSAL TO SEND CORRESPONDENCE BY REGISTERED MAIL

Petitioners claim that since the alleged mail interference occurred during 1971-72, prior to the decision in Martinez v. Procunier, 354 F.Supp. 1092 (1973) which expressly required the within prison officials to revise their treatment of prisoner mail to abide by First Amendment guarantees, Navarette's said allegations run afoul of the precept that a prison official "...is not charged with predicting the future course of constitutional law," Pierson v. Ray, 386 U.S. 547, 557 (1967). However, no evidence is recited in Pierson, supra, that the police therein involved had any judicial warning that the state law under which they made the questioned arrests was about to be overturned on constitutional grounds. Where such judicial warnings exist, such as through court rulings repeatedly striking down as unconstitutional other laws highly similar to the law being enforced, then the innocent state of mind of the enforcing official may indeed be subject to question. Cf. Anderson v. Nosser, 438 F.2d 183 (5 Cir. 1971)(reasonable fact issue raised as to whether defendant police officials were aware of the unconstitutionality of their parade ordinance, which conferred unbridled discretion to deny permits, in light of repeated prior court decisions invalidating similar parade ordinances). Thus herein Navarette argued to the court below that the existence, in 1971-72 of the already numerous federal decisions on First Amendment prisoner rights (fourteen such decisions are cited in Martinez v. Procunier, supra, 354 F.Supp. at 1096), as well as the decision in In re Harrell, 2 Cal.3d 675 (Calif. Sup. Ct. 1970), holding that prisoner regulations by the within prison officials generally should be tailored carefully to limit constitutional prisoner rights only insofar as justifiable by a strict balancing test, certainly sufficed to raise triable issues as to the culpable states of mind of Petitioners when they interfered with Navarette's mail.

Whether Navarette was constitutionally entitled to demand that certain of the correspondence herein involved be sent by registered mail in order to be assured that it reached its destination would seem to depend on an analysis of the appropriateness of the governing prison regulation and its manner of application. This issue should hence likewise be decided, at least in the first instance, at trial upon an airing of evidence as to the character of this regulation and the circumstances surrounding the demand that certain correspondence be registered.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

DATED: December 13, 1976

Respectfully submitted,

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